Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

RICHARD COLE LEIGHTON,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT
OF CRIMINAL APPEALS OF ALABAMA

PETITION OF THE STATE OF ALABAMA

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

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ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1. Does this Court's decision and opinion in Grady v. Corbin, (495 U.S. 508 [1990]), represent an abandonment of the principles announced in Blockburger v. United States, (284 U.S. 299 [1932]), relating to multiple prosecutions each based in part on the same act?

2. Where a party by a single act commits two offenses, "A" and"B", and each of such offenses requires proof of a fact which the other does not and neither offense is included in the other, does a conviction for "A" bar a prosecution for "B", where the indictment for "B" does not allege the commission of "A"?

THE PARTIES

In the Circuit Court of Cherokee County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were Richard Cole Leighton, who is Respondent herein, as Defendant, Appellee, and Respondent, respectively, and the State of Alabama, who is Petitioner herein, as Plaintiff, Appellant, and Petitioner, respectively.

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COURT OF CRIMINAL APPEALS OF ALABAMA

PETITION OF THE STATE OF ALABAMA

The State of Alabama, Your Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and orders of the Supreme Court and Court of Criminal Appeals of Alabama in the above cause.

OPINIONS AND ORDERS BELOW

The Order of the Circuit Court of Cherokee County, Alabama, granting the Respondent's motion to dismiss on double jeopardy grounds is not reported and is

submitted as Appendix "A" to this petition.

The order of the Court of Criminal Appeals of Alabama affirming the Circuit Court's order is reported as follows:

State v. Leighton, 35th case, 586 So.2d 308, (Ala. Cr. App, 1991)

A copy of the unreported memorandum opinion issued with said order is submitted in Appendix "B" hereto.

The order of the Court of Criminal Appeals of Alabama denying rehearing is not reported. A copy of the same is submitted in Appendix "B" hereto.

The order of the Supreme Court of Alabama quashing the writ of certiorari issued to review the above order and opinion is not reported.

A copy of the same is submitted as Appendix "C" hereto.

JURISDICTION

The order of the Supreme Court of Alabama denying review was issued on May 29, 1992, and this petition is filed within ninety (90) days of said date. This Honorable Court's Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Alabama Courts believed that their decisions were mandated by the Double Jeopardy Clause of the Fifth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Your Petitioner is making a claim under the same said provisions. Said constitutional provisions read:

"AMENDMENT V

> "No person shall... be subject for the same offense to be twice put in jeopardy of life or limb...."

"AMENDMENT XIV

"Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

The Respondent was initially convicted under Ordinance 111 of the City of Centre, Alabama. A copy of the same is submitted in Appendix "D" hereto.

Said ordinance adopts the state law and, in the case of the Respondent's initial conviction, the state law was Section 13A-11-73, Code of Alabama, 1975. A copy of the same is submitted in Appendix "E" hereto.

The instant prosecution is being brought under Section 13A-11-72 (a), Code of Alabama, 1975. A copy of the same is submitted in Appendix "E" hereto.

STATEMENT OF THE CASE

The Respondent, Richard Cole Leighton, was indicted for possession of a pistol after conviction for a crime of violence[1], namely murder in the second degree[2], by the Grand Jury of Cherokee

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1. §13A-11-72. CERTAIN PERSONS FORBIDDEN TO POSSESS PISTOL.

"(a) No person who has been convicted in this state or elsewhere of committing or attempting to commit a crime of violence shall own a pistol or have one in his possession or under his control....." (Code of Alabama, 1975; Appendix "E")

2. "§13A-11-70. DEFINITIONS.

"For the purpose of this division, the following terms shall have the respective meanings ascribed by this section:

"(1) PISTOL. Any firearm with a barrel less than 12 inches in length.

"(2) CRIME OF VIOLENCE. Any of the following crimes or an attempt to commit any of them, namely, murder, manslaughter, (except manslaughter arising out of the operation of a vehicle), rape, mayhem, assault with intent to rob, assault with intent to ravish, assault with intent to murder, robbery, burglary, kidnapping and larceny...." (Ibid; emphasis supplied.)

County, Alabama, at the Grand Jury's October, 1990, Term. (R.pp. 5-6)

The indictment reads:

> "The Grand Jury of said County charges that before the finding of this indictment RICHARD COLE LEIGHTON, whose name to the Grand Jury is otherwise unknown than as stated, after having been convicted of the offense of Murder, Second Degree, in the State of California, did have in his possession or under his control a pistol, to-wit: one Colt 45 pistol, in violation of Section 13A-11-72(a) of the Code of Alabama, contrary to law and against the peace and dignity of the State of Alabama." (R.p.5)

On October 11, 1990, the Respondent was advised that he had been indicted and told to appear in court on October 19, 1990, for arraignment. (R.p.7)

On October 19, 1990, the Respondent, attended by counsel, Honorable Gary Davis, was arraigned on the indictment and pleaded not guilty. (R.p.71)

Twenty-seven (27) days later, on November 15, 1990, a motion to dismiss based on an alleged claim of former jeopardy was filed by the Respondent. According to the motion, the Respondent had been charged on September 18, 1990, with possession of a pistol without a permit or license,[3] in the Municipal Court of

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[3] "...Section 1. Any person or corporation committing an offense within the corporate limits of the City of Centre, Alabama, or within the police jurisdiction thereof, which is declared by a law or laws of the State of Alabama now existing or hereafter enacted to be a misdemeanor, shall be guilty of an offense against the City of Centre, Alabama...."
(Ordinance No. 111, City of Centre, Alabama; Appendix "D")

"§ 13A-11-73. License to carry pistol in vehicle or concealed on person -- Required.

"No person shall carry a pistol in any vehicle or concealed on or about his person, except on his land, in his own abode or fixed place of business, without a license therefore as hereinafter provided."(Code of Alabama, 1975; Appendix "E")

Centre, Alabama. The motion claimed that on October 15, 1990, i.e. four (4) days after receiving notice of his having been indicted and four (4) days before his arraignment, the Respondent had pleaded guilty to such charge in the Municipal Court. On the basis of the resulting conviction, the Respondent claimed that the instant charges constituted double jeopardy. (R.pp. 29-30)

On November 26, 1990, the Honorable Trial Judge, so far as the record shows, without hearing evidence, dismissed the indictment on the alleged authority of Grady v. Corbin (495 U.S. 508, 109 L.Ed.2d 548, 110 S.Ct. 2084 [1990]). (R.pp. 32-33; Appendix "A")

Appeal by the Petitioner-State followed. (R.p. 67-69)

[The following is submitted solely for the information of the Court: On

appeal, a controversy arose as to whether the Trial Judge heard evidence without the presence of a court reporter, as contended by the Respondent, or heard no evidence, as contended by the Petitioner State. Although the Petitioner State filed appropriate motions under the Alabama rules of appellate procedure in the Trial Court and the Court of Criminal Appeals and raised the point in the Alabama Supreme Court, the state courts declined to resolve the controversey. As a result, there is no transcript of evidence in the record. Although the Respondent contends that the Trial Judge heard evidence, he has never suggested what the evidence was or what facts were shown.]

On June 14, 1991, the Court of Criminal Appeals of Alabama affirmed the Trial Court's judgement with an unreported memorandum opinion, relying on Grady v.

Corbin, above. (Appendix "B")

The Court ruled that a conviction for possession of a pistol without a permit or license bars a subsequent prosecution for possession of a pistol after conviction for a crime of violence, notwithstanding the fact that the State could prove the latter charge without reference to any lack of a license. (Appendix "B")

On June 21, 1991, the Petitioner State applied for rehearing in the Court of Appeals and moved for the finding of additional facts.

On August 23, 1991, the Court of Appeals overruled the Petitioner State's application without opinion. (Appendix "B")

The Petitioner State sought review of the Court of Criminal Appeals' decision and opinion by petition for a writ of certiorari, in The Alabama Supreme Court, raising the double jeopardy issue raised by

the instant petition.

On December 2, 1991, the Alabama Supreme Court granted the writ. However, on May 29, 1992, the Supreme Court quashed the writ, without opinion. (Appendix "C")

STATEMENT OF THE FACTS

As explained in our statement of the case, at pages 9-10, above, there is no indication in the record as to what, if any, evidence was heard by the Trial Court. The state appellate courts treated the issue here presented as one of the law.

However, the Petitioner-State proceeded in the state appellate courts with the assumption that the possession of a pistol without a license charge and the instant charge of possession of a pistol after conviction for a crime of violence arose out of the same act.

SUMMARY OF THE ARGUMENT

This case is one of many in which the lower courts have interpreted Grady v. Corbin, (495 U.S. 508, 109 L.Ed.2d 548, 110 S.Ct 2084 [1990]), as representing an abandonment of the principles announced in Blockburger v. United States (284 U.S. 299, 76 L.Ed 306, 52 S.Ct. 180 [1932]) and followed ever since. This case, therefore, presents a good opportunity to correct this misunderstanding.

Under the Blockburger Rule, the Respondent obviously has no claim of former jeopardy, but the Alabama Courts decided this case under Grady v. Corbin.

In Grady v. Corbin, this Court recognized that while an offense may not be included in another offense as the two are defined by statute, where an indictment for the greater offense alleges a lesser offense as the means of committing the

greater offense, the lesser offense is included in the greater offense, as charged in the indictment. The rule of Grady v. Corbin would have no application to an indictment like the one in the instant case, which alleges no crime, except that which it charges.

ARGUMENT

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE CONTROLLING DECISIONS OF THIS HONORABLE COURT.

We would like to tell the Court that this case presents a new issue which has never before arisen, but we cannot. This case presents an issue decided sixty years ago, a decision which has been re-affirmed only this year. We would like to tell the Court that this case presents a complex issue of the application of a well established rule, but it does not. The facts, of this case are simple and the rule was obviously misapplied. This case is, however, one of many in which the lower courts have adopted the view that Grady v. Corbin, (495 U.S. 508, 109 L.Ed.2d 548, 110 S.Ct. 2084 [1990]), represents a sharp departure from this Honorable Court's traditional teachings on double jeopardy. At least two such cases have already

burdened this Honorable Court. United States v. Felix 503 U.S. __, 118 L.Ed.2d 25, 112 S.Ct. 1377 (1992); United States v. Dixon, No. 91-1231, cert grant. April 27, 1992, 60 U.S. L.Wk. 3735. This case provides the Court with an opportunity to clarify Grady, so as to guarantee the proper application of the rule of that case to appropriate cases, while preventing needless litigation of the rule in other cases.

For sixty years the decision in Blockburger v. United States (284 U.S. 299, 76 L.Ed 306, 52 S.Ct. 180 [1932]), has provided the infallible test for the jeopardy effect of former prosecutions, which are factually or legally related to the instant prosecution. As applied to the situation presented by this case, where one act violates two statutes, the Blockburger Rule provides:

> "...A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other...." (284 U.S. 299, 304, 76 L.Ed 306, 309)

The most striking example of the application of this rule is in the situation where a person conspires to commit a crime and commits the crime. The Court has consistently held that such a person may be separately prosecuted and punished for the conspiracy and the crime. This is because, each offense requires proof of an act which the other does not. An agreement is required for conspiracy but not for the consumated crime; consumation is required for the crime, but not for conspiracy. See Pinkerton v. United States 328 U.S. 640, 643, 90 L.Ed 1489, 1494, 66 S.ct. 1180 (1946); United States v. Bayer

331 U.S. 532, 542, 91 L.Ed. 1654, 1661, 67 S.Ct 1394 (1947); Iannelli v. United States 420 U.S. 770, 777-779, 43 L.Ed.2d 616, 622-623, 95 S.Ct 1284 (1975), and Garrett v. United States, 471 U.S. 773, 778, 85 L.Ed.2d 764, 771, 105 S.Ct. 2407 (1985), all cited with approval for this proposition in United States v. Felix 503 U.S. __, 118 L.Ed.2d 25, 36, 112 S.Ct. 1377, 1384 (1992).

Alabama follows the Blockburger Rule. Clift v. State, 352 So.2d 838, 839 (Ala, 1977); cert. den, 435 U.S. 909, 55 L.Ed.2d 500, 98 S.Ct. 1459; Ex parte Wright, 477 So.2d 492, 493ff (Ala, 1985); McKinney v. State, 511 So.2d 220 224ff (Ala, 1987); Ex parte Coleman 584 So.2d 455, 457 (Ala, 1991).

Under Blockburger, the instant case is simple. To prove the violation of the city ordinance (Appendix "D"), the

prosecution would have had to prove that the Respondent carried a pistol concealed on his person or in a vehicle, without a license. Section 13A-11-73, Code of Alabama, 1975, Appendix "E". The prosecution would not have been required to prove a prior conviction. To prove the instant charge the prosecution will have to prove that the Respondent possessed or had under his control a pistol, after having been convicted of murder. Section 13A-11-72, Code of Alabama, 1975; Appendix "E". The prosecution would not be required to prove where or how the pistol was possessed nor the lack of a license. Obviously, each charge requires proof of at least one fact which the other does not. Under Blockburger a conviction or acquittal of one charge would not be jeopardy as to the other. However, the Alabama Courts did not decide this case under Blockburger, but

under Grady v. Carbin, (495 U.S. 508, 109 L.Ed.2d 548, 110 S.Ct. 2084 [1990]), which they, like many courts, understood to be a sharp departure from Blockburger.

In Grady v. Corbin, this Honorable Court wrote:

> "...[A]subsequent prosecution must do more than merely survive the Blockburger test. As we suggested in [Illinois v.] Vitale [447 U.S. 410 (1980)], the double jeopardy clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted...." (495 U.S. 508, 521, 109 L.Ed.2d 548, 564)

The Alabama Courts, like many others, read this language to mean that, if to prove the present charge, the prosecution would have to prove an act which was proven in the prior prosecution, then the present prosecution is barred, if such act is unlawful. Such would, of course, always be

the case where the prosecutions are based on the same act. The first prosecution was brought, because the act is unlawful for one reason; the present prosecution is brought because the same act is unlawful for a different reason. Thus, this interpretation of Grady v. Corbin abolishes the rule of Blockburger which allows multiple prosecutions for the same act, if each prosecution requires proof of a fact, which the other does not.

We submit that this is not the correct interpertation of Grady. This approach is simply a variation of the "same evidence rule" which was expressly rejected in Grady. The passage we quote from Grady, above, continues as follows:

> "...This is not an actual evidence or same evidence test... The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the

> presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. See Dowling v. United States, 493 U.S. 342, 107 L.Ed.2d 708, 110 S.Ct. 668 (1990)...." (495 U.S. 508, 522, 109 L.Ed.2d 548, 564-565)

This was re-affirmed in United States v. Felix 503 U.S. , 118 L.Ed.2d 25, 34, 112 S.Ct. 1377, 1382 (1992) The proper understanding of Grady requires that it be read in its historical context.

The line of development from Blockburger to Grady passes through Brown v. Ohio (432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 [1977]) and Harris v. Oklahoma, (433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912 [1977]). Brown and Harris applied the Blockburger rule to lesser offenses included in another offense, where charges based on one have been reduced to judgement and it is proposed prosecute the party for the other. The greater offense would, of

course, require proof of facts which need not be proven to sustain the lesser offense, but proof of the lesser would require proof of nothing not required for the greater. Therefore, the simple application of Blockburger compelled the conclusion that the subsequent prosecution was barred.

Since carrying of a pistol without a license is not in any sense a lesser offense included in possession of a pistol after conviction for a crime of violence, the rule Brown and Harris does not bar the instant prosecution.

The immediate progenitor of Grady v. Corbin, above, was Illinois v. Vitale (447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 [1980]). Both Vitale and Grady involved homicide charges[4] in which the means of the killing, as set out in the information in Vitale and the indictment and bill of particulars in Grady, included separate offenses for which the defendants had already been convicted. In Grady the Court recognized that such separate offenses were included in the homicide charge, because of the averments of the bill of particulars. In other words, while an offense may not be included in a crime as it is defined by

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4 Grady also involved an assault charge, but the difference between homicide and assault are not revelent to this discussion.

statute, it may be included in an offense as charged in a particular indictment. Much of the confusion attributed to Grady arises from efforts to read Grady as a total departure from Blockburger, while Grady, in fact, simply applied the rule of Blockburger to offenses as charged rather than limiting its application to offenses as defined by statute. That this is the correct interpretation of Grady, is demonstrated by the following language from Grady:

> "...The rest of our inquiry in this case is simplified by the bill of particulars filed by the State on January 25, 1988...That statement of the prosecution's theory of proof is binding on the State until amended...[citation omitted.] and the State has not amended it to date...[citation omitted.] The bill of particulars states that the prosecution will prove the following: [Quotation of the bill of particulars omitted.]
>
> "By its own pleadings, the

State has admitted that it will prove the entirety of the conduct[5] for which Corbin was convicted--driving while intoxicated and failing to keep right of the median--to establish essential elements of the homicide and assault offenses. Therefore, the Double Jeopardy Clause bars this successive prosecution, and the New York Court of Appeals properly granted respondent's petition for a writ of prohibition. This holding would not bar a subsequent prosecution on the homicide and assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted (i.e., if the State relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence). (Grady v. Corbin 495 U.S. 508, 523, 109 L.Ed.2d 548, 565-566; emphasis supplied.)

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5 We submit that the Court used "conduct" in the Grady opinion to emphasize that the limitations imposed by the Double Jeopardy Clause cannot be evaded by using different words to describe the same offense.

In other words, if the charges were amended to delete the references to the offenses represented by the prior convictions, Corbin's claim of former Jeopardy would evaporate. The homicide charge would not be barred, even through the prosecution would have to prove that Corbin drove a motor vehicle and not withstanding the fact that such driving was coincidently illegal due to Corbin's state of intoxication and the fact that the driving was in the wrong lane.

We submit that the analysis of Grady v. Corbin, which we present in the previous paragraph is consistent with the whole Blockburger line of cases, from Blockburger itself to United states v. Felix (503 U.S. __, 118 L.Ed.2d 25, 112 S.Ct. 1377 [1992]). We submit that the writ should issue in this case to clarify the opinion in Grady, under the analysis we suggest.

Applying the foregoing analysis to the instant case, it is obvious that the Alabama Courts misapplied the Rule of Grady v. Corbin. For Grady to apply, the indictment must aver the offense represented by the prior conviction. Thus, if the instant indictment made reference to carrying a concealed pistol without a license or otherwise described such conduct, the Grady Rule would have barred the prosecution, until such reference was deleted and replaced with the word "possessed". But, the indictment in this case (R.p. 5), makes no reference to any offense other than that charged. Proving the averment of possession of a pistol would not require or even justify proof of all of the elements of the prior charge, e.g. the Respondent's lack of a license. In the words of Grady v. Corbin, the State Of Alabama will not, "...prove the entirely of

the conduct for which....", the Respondent has already been convicted. See the language quoted at page 27, above. In applying the Rule of Grady v. Corbin to this case, the Alabama Courts erred.

CONCLUSION

In conclusion your Petitioner, the State of Alabama, respectfully submits that in this case the Court of Criminal Appeals and Supreme Court of Alabama, ruled contrary to the decisions of this Honorable Court in every case addressing the issue here raised since 1932, including Grady v. Corbin (495 U.S. 508 [1990]) the decision they relied on as authority. In addition, this case provides an opportunity to clarify misunderstandings and misinterpretations of Grady v. Corbin, which are now burdening the courts.

Therefore, Your Petitioner prays that this Honorable Court will issue a writ of certiorari and will review the matters complained of and reverse the decisions of

the said appellate courts of Alabama.

Respectfully submitted,

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